IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

VILLAGE OF HAVERSTRAW,
Petitioner,

against

CLYDE POTTS,
Respondent.

No.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 110 Fed. (2d) 58.

Jurisdiction.

The grounds for jurisdiction are:

1. The mandate of the Circuit Court of Appeals for the Second Circuit was filed on March 13th, 1940.

2. The judgment was rendered in an action at law.

3. Jurisdiction is invoked under section 240(a) of the Judicial Code, 28 U. S. C. A. section 347, as amended.

Statement.

The facts are stated in the petition.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred in holding

1. That subdivision 21 of section 89 of the Village Law was complied with by the filing of respondent's bills after the commencement of the action.

2. That recovery could be had for any of the services rendered in attempted compliance with the contract of July 2nd, 1928, specifically for those rendered after September 20th, 1928.

3. That the action was not barred by the statute of limitations.

Summary of Argument.

1. UNDER THE PROVISIONS OF SUBDIVISION 21 OF SECTION 89 OF THE VILLAGE LAW, THE FILING OF PLAINTIFF'S BILLS PRIOR TO THE SERVICE OF THE SUMMONS WAS A CONDITION PRECEDENT TO THE MAINTENANCE OF THE ACTION; SINCE CONCEDEDLY THEY WERE NOT FILED UNTIL FIVE YEARS THEREAFTER, THE COMPLAINT SHOULD HAVE BEEN DISMISSED.

2. UNDER SECTION 128(a) OF THE VILLAGE LAW, THE CONTRACT OF JULY 2nd, 1928 WAS ILLEGAL AND VOID, AS THE CIRCUIT COURT OF APPEALS ADJUDICATED ON THE FIRST APPEAL; SINCE TO PERMIT RECOVERY FOR SUCH SERVICES UPON ANY THEORY WOULD DESTROY THE OBVIOUS PURPOSE OF THE STATUTE RECOVERY THEREFOR IS DENIED BY NEW YORK LAW WHETHER SOUGHT UNDER THE CONTRACT OR UPON QUANTUM MERUIT.

3. ASSUMING, ARGUENDO, THAT AFTER THE APPROVING VOTE OF SEPTEMBER 20, 1928, PETITIONER MIGHT LAWFULLY HAVE EMPLOYED RESPONDENT TO RENDER CERTAIN SERVICES, THE MERE EXISTENCE OF SUCH POWER, NEVER EXERCISED, COULD NOT VALIDATE, EVEN IN PART, THE ILLEGAL CONTRACT OF JULY 2nd, 1928 NOR SUPPORT A RECOVERY FOR SERVICES CONCEDEDLY RENDERED THEREUNDER.

4. SINCE AS THE CIRCUIT COURT OF APPEALS HELD RESPONDENT HAD NO CONTRACT IMPLIED IN FACT, AND CONCEDEDLY HE HAD NO VALID EXPRESS CONTRACT, THERE WAS NO BASIS FOR THE RULING THAT RESPONDENT HAD A CONTINUING CONTRACT WHICH TOLLED THE STATUTE OF LIMITATIONS UNTIL RESPONDENT WAS DISCHARGED. THERE BEING AT MOST ONLY A CONTRACT IMPLIED IN LAW, THE STATUTE OF LIMITATIONS RAN FROM THE TIME THE SERVICES WERE RENDERED, BARRING ANY RECOVERY.

POINT I.

Under the provisions of subdivision 21 of section 89 of the Village Law, the filing of plaintiff's bills prior to the service of the summons was a condition precedent to the maintenance of the action; since concededly they were not filed until five years thereafter, the complaint should have been dismissed.

Section 89 of the Village Law enumerates the general powers of the board of trustees of a village and section 21 thereof, dealing with the auditing of bills, provides that such board:

> "Shall audit all bills and accounts and all claims for damages against the village * * *, but no bill or account against the village or any such board or boards for property purchased, materials furnished, services rendered, or disbursements shall be audited or paid, nor shall an action be brought thereon unless such bill or account

> shall be made out in items, and properly dated with an affidavit attached thereto by the person * * * presenting or claiming the same, that the items of such bill or account are correct, that the services and disbursements charged therein have been in fact rendered or paid, and that no part thereof has been paid or satisfied * * * No action shall be brought upon any such bill or account within thirty days from the time the same was presented to the board authorized to audit the same * * *"

Concededly, this action was commenced on June 12th, 1931 (R. 38) and the bills upon which the action is presently founded were not filed until April 15th, 1936 (R. 38).

McGovern v. *City of New York*, 160 Misc. 714, affd. 247 App. Div. 775; 272 N. Y. 455, is directly contrary to the ruling below.

In that case, plaintiff filed his claim with the city on September 12th, 1934. Two days later, September 14th, 1934, he served the summons in his action. On October 17th, 1934 he served his complaint, alleging, in intended compliance with section 261 of the Charter of the City of New York, that he had presented his claim on September 12th, 1934, that the same had not been paid and that more than thirty days had elapsed since such presentment. The Special Term expressly held that the presentment thirty days before the service of the complaint did not comply with the statute; that compliance would result only from such filing more than thirty days before the service of the summons, saying (p. 715):

> "The contention of the plaintiff that the thirty days must have elapsed before the complaint rather than before the summons cannot be sustained. It would lead to the conclusion that the claim or demand may be presented even after the summons has been served, if only by the time of the service of the complaint the plaintiff makes an allegation that thirty days have elapsed since the serving of the claim. Such construction might lead

to extreme results. A summons and complaint might be served before the demand was made. The demand might thereafter be made, and by voluntary extensions of time to serve an amended complaint, or by leave of court the complaint might be amended so that it might then truthfully state that the demand had been served and not complied with. Such result or similar results would remove entirely the protection afforded to the city by this charter provision."

A reference to the case on appeal and the briefs of counsel reveals a most exhaustive examination and discussion of the law by both sides. The case was a hard one as the plaintiff had served the summons two days after filing the claim in order to prevent the operation of a short statute of limitations in the contract upon which he sued. Nevertheless, the Special Term, the Appellate Division and the Court of Appeals unanimously agreed that the statute had not been complied with and this despite the fact, as the plaintiff insistently pointed out, that the charter requirement did not expressly prohibit the institution of an action but merely that no action "shall be prosecuted or maintained" within the thirty days. The much sought distinction between the institution and prosecution or maintenance of the action was refused. That case is therefore directly controlling here since the sufficiency of the filing was the sole point involved.

The distinction between that case and this sought to be made by the court below is, we think, quite unsound. Whereas, as indicated above, that was a hard case, calling for all possible consideration, this was not for, as the court below points out, here the commencement of a new action would have involved nothing more oppressive than the payment of costs. There was, therefore, no occasion to indulge in judicial legislation with respect to words of plain and certain meaning.

In *Reinig* v. *City of Buffalo*, 102 N. Y. 308, a leading case on the subject, the court said (p. 311):

> "The language is 'that no action' 'shall be brought' until, etc., and constitutes an express prohibition against the action, until performance of the condition."

The courts of New York have uniformly held that the statutory conditions precedent to municipal liability must be complied with as written.

In *Ponsrok* v. *City of Yonkers,* 254 N. Y. 91, in holding a notice of claim fatally defective, the court said (p. 95):

> "The fact that the city has not been prejudiced is immaterial. The court may not exercise a dispensing power based on the principles of abstract justice fitting the particular case. It may only see that the requirements of the law are complied with. A notice of claim is not 'verified by the oath of the claimant' when the affidavit is subscribed not by the claimant but by the notary and the jurat is not subscribed by the notary and is attested only by his official seal."

See also

MacMullen v. *City of Middletown*, 187 N. Y. 37, 40-42;

Winter v. *City of Niagara Falls,* 190 N. Y. 198, 202-204;

Casey v. *City of New York*, 217 N. Y. 192, 195-198;

Kaplan v. *City of Poughkeepsie*, 279 N. Y. 153.

POINT II.

Under section 128(a) of the Village Law, the contract of July 2nd, 1928 was illegal and void, as the Circuit Court of Appeals adjudicated on the first appeal; since to permit recovery for such services upon any theory would destroy the obvious purpose of the statute recovery therefor is denied by New York Law whether sought under the contract or upon *quantum meruit*.

Section 128(a) of the Village Law provides:

> "No contract shall be made involving an expenditure by the village unless the money therefor has previously been estimated by the Board of Trustees as necessary to be raised during the then fiscal year, or unless a resolution to borrow money on bonds or other obligations of the village has been adopted by the Board of Trustees, as provided in this chapter or if required by this chapter that the action or resolution of the Board of Trustees be approved by the electors, then by such approval or if such action or resolution is subject to a permissive referendum as provided for in this chapter then not until thirty days after its adoption nor until approved by the affirmative vote of a majority of the qualified electors of such village voting on a proposition for its approval if within thirty days after its adoption there be filed with the village clerk a petition as provided for in article five-a of this chapter, or if authorized by an affirmative vote of the electors of said village in accordance with the provisions of this chapter, or unless otherwise available or specifically provided for by this chapter."

Upon the first appeal in holding that the contract of July 2, 1928 was invalid for violation of this statute, Judge Learned Hand said (R. 99):

"This was intended to forbid villages to contract obligations without providing the means of payment; * * *"

He further said (R. 104):

"Section 128(a) may forbid any recovery even on a quantum meruit * * *"

Upon the appeal below it was stipulated (R. 38):

"2. All of the services rendered by plaintiff were in attempted compliance with the said contract of July 2, 1928 * * *"

It follows that the recovery herein indirectly compensates respondent for services for which compensation was denied when sought directly on the contract at the first trial.

That the statute may not thus be readily frustrated has been the uniform ruling of the courts of New York in this class of cases as well as of other courts.*

McDonald v. *Mayor*, 68 N. Y. 23, was an action to recover the value of certain material used in the repair of city streets. Plaintiff failed to prove compliance with statutory requirements that the necessity for the materials be certified by the head of the Department of Public Works, the expenditure authorized by the common council and the contract entered into by the appropriate head of the department upon sealed bids after public notice. Liability was sought to be imposed

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* *Bonesteel* v. *Mayor*, 22 N. Y. 162, 170; *Donovan* v. *Mayor*, 33 N. Y. 291, 293; *Wakefield* v. *Brophy*, 67 Misc. 298, affd. 144 App. Div. 905, affd. 207 N. Y. 772; *Ford* v. *Mayor*, 63 N. Y. 640; *McDonald* v. *Mayor*, 68 N. Y. 23, 28; *Parr* v. *Village of Greenbush*, 72 N. Y. 463, 472; *Dickinson* v. *City of Poughkeepsie*, 75 N. Y. 65, 75; *Smith* v. *City of Newburgh*, 77 N. Y. 130, 136; *Kramrath* v. *City of Albany*, 127 N. Y. 576, 582; *Village of Fort Edward* v. *Fish*, 156 N. Y. 365, 371-373; *Matter of Niland* v. *Bowron*, 193 N. Y. 180; *Hart* v. *City of New York*, 201 N. Y. 458; *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45, 52; *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370, 375; *Edison El. Co.* v. *Pasadena*, 178 Fed. 425; *Perry W. L. & I. Co.* v. *Perry*, 29 Okla. 593, 120 Pac. 582; *Gutta Percha & R. M. Co.* v. *Village of Ogalalla*, 40 Neb. 775, 59 N. W. 513; *Johnson County S. B.* v. *City of Creston*, 212 Iowa 929, 231 N. W. 705; Restatement Law of Contracts, section 598; 84 A. L. R. 926.

upon implied contract because of the use of plaintiff's materials. In holding otherwise, the court said (p. 28):

> "Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot, become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? The Bank of the United States v. Danbridge (supra), which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must be observed. And the California cases above cited, concede the same. It is plain, that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of the debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors. * * * This opinion goes no further than to hold, that where a person makes a contract with the city of New York for supplies to it, without the requirements of the charter being observed, he may not recover the value thereof upon an implied liability."

Dickinson v. *City of Poughkeepsie*, 75 N. Y. 65, was an action to recover on a contract or, in the alternative, upon *quantum meruit*. The contract was held to be illegal because of failure to observe the statutory requirements to let

the contract to the lowest bidder. In holding that no recovery could be had in *quantum meruit*, the Court said (pp. 74, 75):

> "A promise to pay cannot be implied, where there is no power to contract. (Burrill v. Boston, 2 Clifford, 590; Dillon on Mun. Corp., section 383).
>
> Nothing could be more futile than the prohibition of the making of a contract except with the lowest bidder, if the contract having been made in direct violation of this prohibition, it could be rendered valid merely by being persisted in by both parties, contrary to public policy and the law. If the execution of a contract, the making of which is prohibited, as against public policy, absolutely cures its invalidity, a mere continuance in violation of law would have certainly a strange result. It is difficult to see what use or force there could be in such prohibitions, so general as to municipalities and so much a part of our policy in this State, if the consummation of their violation brings with it the protection of the law and a right of action for payment upon the void contract. The contrary we understand to be settled by adjudication. (Hodges v. Buffalo, 2 Den., 110; Brady v. New York, 20 N. Y., 312; Halstead v. New York, 3 Comst., 430; McDonald v. New York, 68 N. Y., 23; Cowen v. West Troy, 43 Barb., 48; Dillon on Mun. Corp., section 385).
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> With regard to the first ground of recovery upon a quantum meruit the point seems to be settled adversely to the plaintiffs by authority. The cases generally hold that there can be no recovery against a municipality for services performed upon a contract void for want of power to make it, although performed upon the property of the municipality, and of which they have the benefit. As was said in Burrill v. Boston (2 Clifford, supra), there can be no implied promise to pay upon a quantum meruit, where there is no power to contract, either expressly or impliedly, except upon a written contract with the lowest bidder after advertisement.

(See Bonesteel v. New York, 22 N. Y., 162; Brady v. New York, supra; Hodges v. Buffalo, supra; McDonald v. New York, supra.)"

In *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45, plaintiff brought an action to rescind certain purchases of real property for misrepresentation as to the sufficiency of title and to recover the price paid therefor. In holding that the action could be sustained, the court thus adverted to the rule effective here (p. 52):

> "Assuming, however, that the defense is here on the merits, it is undisputed that a municipality cannot be made liable for breach of contract, or services rendered, or sales price, or even for use and occupation of property acquired, when an official of the municipality has exceeded his power of authority. (Village of Fort Edward v. Fish, 156 N. Y. 363; Donovan v. Mayor, 33 N. Y. 291; Supervisors of Rensselaer County v. Bates, 17 N. Y. 242.)"

That the rule here invoked applies to the whole field of municipal contracts was illustrated by the recent case of *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370. The plaintiff had dedicated certain streets to the defendant on condition that defendant refund to plaintiff the cost of improvements therein. This, the village trustees had agreed to do. However, the village resisted the action to recover this sum on the ground that the agreement to refund was beyond the power of the trustees. In defeating recovery, the court said (p. 375):

> "The defendant village has only those powers which the Legislature has conferred upon villages of the third class, and the powers so conferred upon the village may be exercised only in the manner provided by the Village Law, and through the officers authorized by the statute to act for the village. The power of a village to enter into contracts and to incur financial obligations is subject to statutory conditions and restrictions in-

tended to protect the inhabitants and taxpayers against ill-considered or extravagant action."

Since, therefore, respondent's services were rendered in performance of the invalid contract, no recovery upon *quantum meruit* was authorized.

The court below, while expressing some doubt, assumed that ordinarily this rule would have barred any recovery by respondent. It held, however, that the rule had no application to the services rendered after September 20th, 1928 because the electors then approved the project.

POINT III.

Assuming, arguendo, that after the approving vote of September 20, 1928, petitioner might lawfully have employed respondent to render certain services, the mere existence of such power, never exercised, could not validate, even in part, the illegal contract of July 2nd, 1928, nor support a recovery for services concededly rendered thereunder.

In sustaining the recovery, the court below assumed

> "that the referendum did not ratify the employment either from August 8th or from September 4th. * * * We may so proceed because the second of the defendants' three points on appeal is that the plaintiff cannot recover anything whatever for services rendered under the 'illegal contract'; and that is certainly untrue as to those rendered after September 20th."

The reason for this was stated earlier in the opinion to be that approval of the project authorized the trustees to present an application to the Water Power & Control Commission and

> "the earlier unauthorized attempt to contract with the person so employed did not prevent the law from raising an obligation to pay him, * * *".

No authority for this proposition is cited.

Not only is it opposed to the uniform line of decisions heretofore cited but it requires a fiction to sustain it.

The fiction is twofold: (a) that pursuant to the authority resulting from the vote, respondent was employed, and (b) that respondent would have rendered services to the limited extent thereby authorized.

The first of these fictions is self evident. The difficulty which it entails is apparent from the statement of the court below that the contract is implied not in fact but in law and that

> "* * * it is precisely when both parties are mistaken, that the law raises an obligation ex aequo et bono in its place."

By this holding, the court did precisely what the authorities heretofore cited have held would not and should not be done, viz., raise up an implied contract to defeat the salutary principle of the statute.

The vice of the second fiction may be as readily exposed. Upon the first appeal, the court below pointed out (R. 100) that the vote of the electors authorized the trustees to go no further than to employ help in the proceeding before the Water Power & Control Commission. *Non constat* that respondent would have accepted such limited employment (cf. R. 103).

That the electors' approval of the project was no ratification or approval of respondent's employment, past, present or future, follows from two facts, (1) the electors had no power so to ratify, (2) ratification was not submitted to them. The limitation upon petitioner's power to contract imposed by section 128-a was an act of the Legislature of

the State of New York, and it alone had power to ratify the illegal act. It did not give such power to the electors of the village. Section 221 of the Village Law, under which the referendum was held, provides:

> "The board of trustees of any village may by resolution adopted at a regular meeting, determine upon the establishment of a system of water works for supplying the village and its inhabitants with water, or for the acquisition of an existing private system, at an expense in either case not exceeding the sum stated in the resolution; except that if the resolution expressly authorized the condemnation of an existing private system, under the provisions of subdivision two of section two hundred and twenty-two the expense of acquisition by condemnation need not be stated. Such action shall be subject to a permissive referendum as hereinbefore defined."

As contemplated by this section, the only matter submitted to the electors was authorization of the project, the proposition on the ballot being as follows (R. 54):

> "Shall the Village of Haverstraw establish a waterworks system costing not over $450,000 and issue its bonds to pay such cost and raise annually by tax money to pay such bonds in 40 annual installments with interest, as proposed?"

Can it be seriously argued that that proposition presented respondent's contract or employment to the electors for their approval or ratification? Not even the circular explaining the project (R. 55), prepared by respondent, despite its elaborate detail, made any reference to the contract. The statement therein (R. 56) that respondent "had designed a complete new system and estimated the cost of construction and operation" was no notice that a continuing and partially unfulfilled contract was up for approval or ratification. There was no notice to the electors that they were called upon to act with regard to an irregular contract, the

terms of which would bind the Village irrespective of whether the project was authorized by the Water Power & Control Commission or ultimately constructed. No principle is more thoroughly settled than that there can be no ratification without clear, definite notice of all relevant facts.

Smith v. *Kidd*, 68 N. Y. 130;
Bierman v. *City Mills Co.*, 151 N. Y. 482;
Corrigan v. *Bobbs-Merrill Co.*, 228 N. Y. 58;
Bloomfield v. *Charter Oak Nat. Bank*, 121 U. S. 121;
Western Nat. Bank v. *Armstrong*, 152 U. S. 346.

Moreover, the case was not submitted to the jury on the theory that the vote of September 20th ratified the contract of July 2nd and thus authorized a recovery. The court charged that the jury must disregard the writing (R. 70, 80) and must find an implied obligation in the vote of September 20th to pay respondent for services to that time (R. 72). To this theory, petitioner excepted (R. 79, 80). At petitioner's request, the court expressly charged (R. 87):

> "The proposition as submitted to the voters on September 20, 1928 did not include approval or disapproval of plaintiff's contract of July 2nd, 1928."

There is a further fundamental objection to the use of the September 20th vote to support respondent's recovery. It was not the basis upon which plaintiff rendered any of his services. The sole basis was the illegal contract (p. 38). Since the contract was the sole consideration, the recovery must stand or fall upon it. The applicable rule was thus stated by Judge Cardozo in *McGovern* v. *City of New York*, 234 N. Y. 377, in the following prior decisions of this Court (pp. 388-389):

> "'Nothing is consideration,' it has been held, 'that is not regarded as such by both parties.' (Philpot v. Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. v. Wick-

ham, 141 U. S. 564, 579; DeCicco v. Schweizer, supra, at p. 438). The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough (Fire Ins. Assn. v. Wickham, supra). Promisor and promisee must have dealt with it as the inducement to the promise (Holmes Common Law, p. 292; Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386; 1 Williston, Contracts, section 139, p. 309)."

The fact that some other valid consideration might possibly have been adopted, which would have authorized a recovery, cannot, by the use of a fiction, be availed of to enable plaintiff to escape from the consequences of what was in fact illegal consideration.

And since the consideration upon which plaintiff rendered his services was the indivisible (79 Fed. (2) at p. 104), illegal contract of July 2nd, the taint of that contract invalidates any portion of that contract which might possibly have been good, if it stood alone.

Restatement, Law of Contracts, Section 607:
Hazelton v. *Sheckells,* 202 U. S. 71, 78;
Foley v. *Speir,* 100 N. Y. 552;
Central New York Tel. & Tel. Co., v. *Averill,* 199 N. Y. 128;
Manson v. *Curtis,* 223 N. Y. 313;
Angresam v. *Tozzi,* 217 App. Div. 642, affd. 245 N. Y. 558.

No matter how ingeniously the arguments may be contrived, escape is impossible from the fact that the services were rendered under the illegal contract and that to whatever extent compensation therefor may be granted, to that extent the purpose of the prohibition of section 128(a) will be thwarted.

POINT IV.

Since as the Circuit Court of Appeals held respondent had no contract inplied in fact, and concededly he had no valid express contract, there was no basis for the ruling that respondent has a continuing contract which tolled the Statute of Limitations until respondent was discharged, there being at most only a contract implied in law, the Statute of Limitations ran from the time the services were rendered, barring any recovery.

The motion to amend to set up the new cause of action on *quantum meruit* was made June 8, 1936 (R. 1).

Concededly, the applicable New York statute of limitations is a six year statute (R. 107). If the last item of service is controlling then unless services were rendered after June 8th, 1930 the claim is barred. This the court below stated on the second appeal (R. 107-108).

It held, however, that if the nature of respondent's employment was a continuing contract, the rendition of services would not necessarily be controlling unless fully performed; if only partially performed the statute might not begin to run until there was either full performance or discharge (R. 108-109).

Since the second appeal was heard on the pleadings alone and the illegality of respondent's original employment was not considered, the case was remanded for trial.

It is conceded (R. 38) that "all of the services" were rendered under the illegal contract. There was, therefore, as the court below held, "no contract implied in fact." The recovery was sustained upon one implied in law "ex aequo et bono."

In view of this ruling it is difficult to follow the holding below on the question now being considered.

If there was contract implied in fact there was no continuing contract except the illegal contract of July 2nd, 1928 which could not be the basis of any liability whatever. Nor could it be the basis for a continuing contract.

Thacher v. *N. Y. W. & B. Ry. Co.*, 153 App. Div. 186, 189-190.

Conclusion.

For the foregoing reasons, it is submitted that this cause involves questions of law of great importance to municipalities, with respect to which the court below has ruled in direct contradiction to positive and applicable decisions of the highest court of the State of New York, a conflict which this court should resolve.

It is therefore respectfully submitted that the case justifies the issuance of a writ of certiorari.

Respectfully submitted,

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